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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THOMAS M. COLEMAN, Individually and As Trustee, etc., Plaintiff and Respondent, v. WELLS FARGO BANK, N.A., Defendant and Appellant.	B224643 (Los Angeles County Super. Ct. No. SC106069)

APPEAL from an order of the Superior Court of Los Angeles County. Joseph S. Biderman, Judge. Affirmed.

Sullwold & Hughes, Robert T. Sullwold and James A. Hughes for Defendant and Appellant.

White & Reed and Michael R. White for Plaintiff and Respondent.

Defendant Wells Fargo Bank, N.A. (Wells Fargo) appeals from an order denying its motion to compel arbitration and stay proceedings with respect to plaintiff Thomas M. Coleman's complaint that Wells Fargo acted negligently and breached its fiduciary and contractual duties by purchasing three securities for one of Coleman's Investment Management Accounts (IMAs). The lower court held that Wells Fargo could not establish either the existence of an arbitration provision in the IMA or an arbitration provision incorporated by reference. We affirm.

FACTUAL AND PROCEDURAL HISTORY

I. THE ACCOUNTS

Wells Fargo provides banking, lending, and investment services to individuals and trustees. One of these services is an IMA, where Wells Fargo employs portfolio managers, known as Wealth Advisors, to make investment decisions, usually after discussing their recommendations with a client. In November 2004, Coleman opened three IMAs in the name of the Thomas M. Coleman Family Trust (the Agreement), the Coleman Family Holdings, LLC, and the Thomas Coleman Holdings I, LLC.

In support of the motion to compel arbitration and stay proceedings, Wells Fargo submitted the declarations of its counsel and of James D. McCabe, the Wealth Advisor responsible for Coleman's accounts. The McCabe declaration stated that, at the time of the Agreement, Wells Fargo used a ten-page document to open an IMA. As an exemplar, the McCabe declaration attached a full ten-page document (the Form Agreement) in effect as of September 2004, which included the August 2004 Terms and Conditions on pages 6 to 10. The pages of the IMAs were numbered consecutively as "Page [X] of 10." The first five pages are a form contract where a client would fill in information, including but not limited to, his contact information, capacity, account type. Then, a client would authorize the transaction on pages 4-5, the signature pages. The first paragraph on page 1 of the IMA states that it "shall include the Terms and Conditions section dated _____ and any addenda provided to the Client." After that reference, pages 1 through 5 mention the

Terms and Conditions several times. In one instance, under the section heading of "ARBITRATION," the provision states: "STATE OF _____. Please refer to Terms and Conditions for further information." On page 10, paragraph 25 contains the provision: "Any dispute under this Agreement shall be submitted to binding arbitration in the State indicated in the Agreement in accordance with the Commercial Arbitration Rules of the American Arbitration Association."

II. THE PLEADINGS

A. Wells Fargo's Motion to Compel Arbitration

Coleman filed suit against Wells Fargo and its affiliate, Wells Fargo Investments, LLC,[1] in December 2009. The complaint contends that Wells Fargo acted negligently and breached its fiduciary and contractual duties by purchasing three securities for the Agreement. Wells Fargo requested Coleman submit to arbitration, and he declined to do so. Wells Fargo filed a motion to compel arbitration pursuant to the Federal Arbitration Act, title 9, United States Code sections 2 and 3, and Code of Civil Procedure sections 1281 and 1281.4.

In support of the motion to compel arbitration, the McCabe declaration attached five exhibits, Exhibits A-E. Exhibit A is the IMA that Coleman opened on behalf of Coleman Enterprises, LLC, dated May 2003. Exhibit B is the Form Agreement. Exhibit C is an internal Wells Fargo checklist that lists the necessary contract documents that were sent to Coleman in order to finalize the Agreement. Exhibit D is a letter that was mailed with the IMAs that listed the names of each IMA included in the letter. Exhibit E is Wells Fargo's copy of the Agreement. On page 5 of Exhibit E, a provision stated "Client has received, read, understood and agreed to this Investment Management Agreement dated below including the attached Terms and Conditions section, and any addenda that together make up the provisions of this Investment Management Agreement." However, the August 2004 Terms and Conditions were not attached as a

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[1] Wells Fargo Investments, LLC (WFI) is a separate entity from Wells Fargo. Coleman dismissed WFI as a defendant.

part of Exhibit E. And the field for identifying the applicable Terms and Conditions by date was left blank in the Agreement.

Additionally, the McCabe declaration also stated that his assistant, Lynn Chabrianne, was "responsible for sending the contract documents necessary to open an IMA to the client in accordance with the checklist" and that she "was meticulous in following the established procedure."

B. Coleman's Opposition

In his opposition to the motion to compel arbitration, Coleman contended that he never received the August 2004 Terms and Conditions as a part of the IMA agreement, nor were they provided to him afterwards. In the declaration of Coleman's assistant, she pointed out that neither the copy of the Agreement maintained by Coleman nor the copy maintained by Wells Fargo had any Terms and Conditions attached. Additionally, while the Agreement states that it includes a "Terms and Conditions section," the Agreement does not identify them. The place in the Agreement for such identifying information, by date, was left blank in the Agreement.

III. THE TRIAL COURT'S RULING

On May 6, 2010, the trial court denied Wells Fargo's motion to compel arbitration. The trial court found that Wells Fargo could not establish the existence of an agreement to arbitrate. First, the trial court acknowledged that the McCabe declaration stated that McCabe's assistant was responsible for sending the contract documents to Coleman and that she was meticulous in following established procedure, i.e., a checklist, so that all documents, including the Terms and Conditions were included. However, "there is no documentary evidence to show that the Terms and Conditions were sent." Second, the identifying date for the Terms and Conditions on page 1 was left blank.

Additionally, the trial court found that the Agreement did not sufficiently incorporate the Terms and Conditions by reference. The trial court stated that "[t]hose requirements are simply not met here."

Moreover, the court noted even though Coleman "executed a similar agreement on behalf of a different entity more than one year earlier does not mean that he was reasonably appraised of the Terms and Conditions, including the arbitration provision, sought to be enforced here."

DISCUSSION

I. STANDARD OF REVIEW

Even though the law favors agreements for arbitration of disputes between parties, """there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate."""" (*Victoria v. Superior Court* (1985) 40 Cal.3d 734, 744.) The existence of such agreement in a contract is determined under standard rules of contract interpretation. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 787.) Therefore, the standard of review from the denial of a motion to compel arbitration is de novo to determine whether the arbitration is legally enforceable, applying general principles of California contract law. (*Kleveland v. Chicago Title Ins. Co*. (2006) 141 Cal.App.4th 761, 764.)

Moreover, the petitioner seeking to compel arbitration bears the burden of proving the existence of an arbitration agreement by a preponderance of the evidence. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413-414; *Hotels Nevada v. L.A. Pacific Center, Inc*. (2006) 144 Cal.App.4th 754, 763-764.) Facts relevant to enforcement of the arbitration agreement must be determined "'in the manner . . . provided by law for the . . . hearing of motions.'" (*Rosenthal,* at p. 413.) This "ordinarily mean[s] the facts are to be proven by affidavit or declaration and documentary evidence, with oral testimony taken only in the court's discretion." (*Id.* at pp. 413-414.)

II. EXISTENCE OF AN ARBITRATION AGREEMENT

This court upholds the lower court's holding that Wells Fargo could not establish the existence of an arbitration provision in the Agreement. The threshold consideration of contractual arbitration is to determine the existence of an agreement to arbitrate. A

party seeking to compel arbitration pursuant to Code of Civil Procedure section 1281.2 must "*plead and prove* a prior demand for arbitration under the parties' arbitration agreement and a refusal to arbitrate under the agreement." (Emphasis added.) (*Mansouri v. Superior Court* (2010) 181 Cal.App.4th 633, 640-641.)

The only evidence submitted in support of Wells Fargo's motion to compel arbitration was McCabe's declaration. The only evidence in the McCabe declaration set forth to prove the existence of an arbitration clause are Exhibits A-E, and McCabe's statement that his secretary "was meticulous in following the established procedure." However, nothing in the McCabe declaration establishes that the August 2004 Terms and Conditions were sent to Coleman. There is no documentary evidence that the Agreement contained the Terms or Conditions. In fact, the space reserved for identifying the Terms and Conditions on page 1 of the Agreement was left blank.

First, Coleman's signature on the Agreement with a provision stating, "Client has received, read, understood and agreed to this Investment Management Agreement dated below including the attached Terms and Conditions section, and any addenda that together make up the provisions of this Investment Management Agreement" is not a clear consent to arbitrate. Absent a clear agreement to submit disputes to arbitration, courts will not infer that the right to a jury trial has been waived. (*Adajar v. RWR Homes, Inc.* (2008) 160 Cal.App.4th 563, 569.)

For example, in *Metters v. Ralphs Grocery Co.* (2008) 161 Cal.App.4th 696, 703-704, an employee submitted a company-provided dispute form for informal resolution of a discrimination claim. The signature block on the form alerted the signatory that the form committed the signatory to a "'Mediation & Binding Arbitration Policy.'" (*Id.* at p. 699.) The form stated that the employee acknowledged receipt of the policy and also stated that if informal resolution was unsuccessful, the only means of resolution was mediation or arbitration pursuant to the policy. (*Id.* at pp. 699-700.) However, the employee contended that he never received a copy of the policy, and the employer could not establish employee's receipt of the policy. (*Id.* at p. 700.) Therefore, the Court of

Appeal held that no agreement to arbitrate was established. (*Id.* at p. 704; see also *Mitri v. Arnel Management Co.* (2007) 157 Cal.App.4th 1164, 1166, 1173 [holding an employee's signature acknowledging receipt of handbook as condition of employment was insufficient to prove arbitration agreement where employer did not produce a copy of a signed agreement].)

As in *Metters*, the Agreement alerts Coleman to the possibility of additional terms and conditions. However, unlike in *Mitri*, the existence of an arbitration clause is less obvious in the Agreement. Granted, there is one heading section that mentions arbitration, however, the other sections merely refer to "Terms and Conditions." In contrast, in *Mitri,* the form specifically called out and alerted the signatory to a "'Mediation & Binding Arbitration Policy.'" Yet, the court in *Mitri* still found this notice to be insufficient because the employee never received a copy of the policy. Similarly, Coleman contends that he never received the policy, and Wells Fargo cannot establish Coleman's receipt of the August 2004 Terms and Conditions, especially since the identifying date marker of the Terms and Conditions was left blank.

Second, the extrinsic evidence does not establish Coleman's receipt and acceptance of the August 2004 Terms and Conditions. Most notably, Wells Fargo contends that Coleman must have received the August 2004 Terms and Conditions because McCabe's assistant was "meticulous" in following the the checklist of Wells Fargo procedure for opening IMAs (Exhibit C) and there was a letter that memorialized the IMAs (Exhibit D).

However, the checklist does not specifically list the Terms and Conditions that were purportedly sent. In the most applicable section, the Agreement merely states that "INVESTMENT MANAGEMENT AGREEMENT FOR U.S. CITIZENS, RESIDENT ALIENS, AND DOMESTIC PARTNERSHIPS, CORPORATIONS AND OTHER INSTITUTIONS – Use version applicable to your state." No other section in Exhibit C mentions "Terms and Conditions" as well.

So even assuming that McCabe's assistant's "meticulous" behavior is admissible habit evidence under Evidence Code section 1105, that habit evidence still fails to establish that the August 2004 Terms and Conditions were sent. The McCabe declaration states that "[m]y assistant . . . was responsible for sending the contract documents necessary to open an IMA to the client *in accordance with the checklist.* [My assistant] was meticulous in following the established procedure." (Emphasis added.) Since Exhibit C fails to note anywhere that any set of Terms and Conditions was sent, it is not possible to establish whether the August 2004 Terms and Conditions were sent. Moreover, Wells Fargo does not offer any additional documentary evidence for what any other "established procedure" means.

Finally, Exhibit D merely states that three IMAs were mailed to Coleman. This letter does not mention anything else.

III. INCORPORATION BY REFERENCE

This Court upholds the lower court's holding that the August 2004 Terms and Conditions were not incorporated by reference into the Agreement. An agreement need not expressly provide for arbitration but may incorporate by reference another document containing an arbitration clause. (*Adajar v. RWR Homes, Inc.*, *supra*, 160 Cal.App.4th at p. 569.) Contracts may include provisions that are not physically a part of the basic document so long as these provisions are sufficiently incorporated by reference. (*Wolschlager v. Fidelity National Title Ins. Co.* (2003) 111 Cal.App.4th 784, 790.) Incorporation by reference requires that: (a) the reference to another document was *clear and unequivocal*; and (b) the terms of the incorporated documents were known or easily available to the contracting parties. (*Id.* at pp. 790-791.) Other cases add a third requirement that the reference was called to the attention of the other party, who consented to that term. (*Id*. at p. 790.)

First, the reference is not clear and unequivocal. The Agreement states that "the Terms and Conditions section dated _____ and any addenda provided to the Client." Wells Fargo's failure to include any identifying information in the space provided in the

Agreement creates ambiguity as to what should be attached, if anything at all. Since the Agreement was prepared by Wells Fargo, any ambiguities are construed against the drafter. (*Victoria v. Superior Court, supra*, 40 Cal.3d at p. 739.)

Second, Wells Fargo failed to prove by a preponderance of the evidence that Coleman consented to the arbitration clause in the August 2004 Terms and Conditions. The acknowledgement on the signature page merely refers to the "attached" Terms and Conditions and other addenda. It does not mention any arbitration clause.

Third, Wells Fargo fails to prove that the terms of the incorporated documents were known or easily available to Coleman. For example, in *Chan v. Drexel Burnham Lambert, Inc.* (1986) 178 Cal.App.3d 632, 635, Drexel sought to compel Chan to arbitrate her employment dispute according to a previous agreement that Chan had signed. The agreement did not identify by name the applicable rule or document requiring arbitration in which an arbitration provision could be found. (*Id.* at pp. 643-645.) The court held that the failure to identify the applicable form by name would fail to guide the reader to the incorporated document; therefore, the agreement failed to clearly and unequivocally refer to the document in order to incorporate by reference. (*Id.* at p. 643.)

The court expressly rejected the argument that even if a rule containing the arbitration were readily available to Chan, the agreement itself did not adequately or clearly refer to it. Therefore, Chan could not be held to have been on notice of the arbitration agreement and it did not become part of the agreement. (*Chan v. Drexel Burnham Lambert, Inc, supra,* 178 Cal.App.3d at pp. 644-645.)

In contrast, in *Wolschlager v. Fidelity National Title Ins. Co., supra*, 111 Cal.App.4th at pages 790-791, the plaintiff purchased a title insurance policy from the defendant. The plaintiff received and approved a preliminary title report, which listed specific documents and referenced the policy by name. Later, the plaintiff received the actual referenced policy, which incorporated an arbitration provision. The Court held that this was clear and unequivocal incorporation by reference. (*Id*. at p. 791.)

Therefore, the lack of an identifying date resulted in a failure to clearly identify the Terms and Conditions of the IMA. It does not matter whether Coleman could have easily called Wells Fargo and requested the Terms and Conditions. Coleman could not be held to be on notice of the Terms and Conditions and, therefore, the Terms and Conditions did not become part of the Agreement.

DISPOSITION

The order is affirmed. Respondent to recover costs on appeal.

WOODS, J.

We concur:

PERLUSS, P. J.

JACKSON, J.